

To: James.Monroe@sol.doi.gov[]
Cc: David_Nawi@ios.doi.gov[]
Bcc: []
From: CN=Tom Hagler/OU=R9/O=USEPA/C=US
Sent: Tue 10/25/2011 3:58:09 AM
Subject: RE: Maintaining Confidentiality in the CALFED process

I think Jim makes a good point. But I don't know what to do with it. My guess is that BDCP is probably a sieve too, so you aren't really getting confidentiality. And this whole promise of openness has already been made, very publicly.

I guess you could formalize it so that everyone who has access signs a confidentiality agreement, just making sure that each interest group is covered. That, arguably, gives you a claim that you are being open. But you may be beyond that point in the public discussion already. Your call, obviously.

Another point about the CALFED process is that we did set up a central document repository, so that everything that came into the effort was cataloged. A massive file. Alf, Mary Schoonover, Marian "Blank" and partly me set that process in motion. So when the FOIAs and lawsuits came in, it was easier to cope. I hope someone is thinking about that in the BDCP world.

-----"Monroe, Jim" <James.Monroe@sol.doi.gov> wrote: -----
To: "Nawi, David" <David_Nawi@ios.doi.gov>, Tom Hagler/R9/USEPA/US@EPA
From: "Monroe, Jim" <James.Monroe@sol.doi.gov>
Date: 10/24/2011 05:43PM
Subject: RE: Maintaining Confidentiality in the CALFED process

I understand that some historians think that glasnost contributed in the collapse of the Soviet Union...

More seriously, but still related to the above thought, the more openness you have, the more that the process has to hew to statute, regulation, formally adopted policies, etc. If it does not, opponents of the program will have that much greater an opportunity to salt the record with observations on how the process, or the substantive information presented in the documentation, is flawed.

From: Nawi, David
Sent: Monday, October 24, 2011 5:36 PM
To: Hagler.Tom@epamail.epa.gov
Cc: Monroe, Jim
Subject: RE: Maintaining Confidentiality in the CALFED process

Tom – Thanks very much – this will help.

From: Hagler.Tom@epamail.epa.gov [mailto:Hagler.Tom@epamail.epa.gov]

Sent: Monday, October 24, 2011 5:32 PM
To: Nawi, David
Subject: Maintaining Confidentiality in the CALFED process

I wanted to memorialize some discussions we've had about how the CALFED program (roughly 1995 through 2000) dealt with the whole issue of confidentiality as we prepared the many different iterations of the EIS/EIR. And remember, this was a long time ago, and my memory may be wrong. You might want to check with Alf Brandt, the DOI solicitor working on this at the time. Or Danae Acheson of the AG's office.

As I've said, after the first year or so, we gave up trying to preserve confidentiality of the drafts. There were a number of reasons for this. First, we couldn't really figure out a way to prevent releases under FOIA under the deliberative process exemption, because DOJ rarely defends that privilege. (Note: I think we did try to maintain the attorney client/attorney work product privilege, but that's a different issue). Second, we were trying to be transparent and inclusive, and it became clear almost immediately that each interest group had its favorite mole or moles. That is, everything was leaking out anyway. So we just moved to an open process where drafts of almost everything were distributed within the interested community very quickly. Always labeled with disclaimers etc., but we didn't try to hide it and frequently intentionally distributed some major work products to the stakeholder participants to solicit informal reactions.

Questions:

(1) Did we publicly announce that everything was available to everyone? I don't think so. I think we just stopped trying to keep it confidential, and gave things to those who asked.

(2) What did we do with the letters that came in as responses to our drafts? We had some staff (Olene Chard, I think) at the CALFED office who collected everything that came in. I do not know whether she explicitly added each of those incoming letters to the "formal" comment pile? I don't know for sure. We could ask Danae Acheson at the AG's office. She would know.

(3) Did we literally give everything out as soon as it was written? No, it was more of a rule of reason as to when had the action agencies felt comfortable with it going to any of the stakeholders. But we were pretty consistent about making it available to all of them once it went out to any of them.

(4) Did this "process" apply explicitly to Draft EIS/EIRs? I believe it applied to all of our "operative" documents. Remember, in the CALFED program, the major documents were the EIS/EIRs, appendices thereto, and the Phase II reports (kind of a summary status report that became the program summary by default). I'm pretty sure that our "openness policy" ("glasnost"?) applied to all of that. It was just such a sieve that it became useless trying to hide things, and we looked silly when we tried.

Hope that helps.